IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MICHAEL P. & SHELLIE GILMOR, et al.,	)	
	)	Case No. 4:10-cv-0189-ODS
Plaintiffs,	)	
	)	
v.	)	
	)	
PREFERRED CREDIT CORPORATION,	)	
et al.,	)	
Defendants.	)	

SOVEREIGN BANK'S MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS BASED ON HOLA PREEMPTION AND SUPPORTING BRIEF

Pursuant to Fed.R.Civ.P. 59 and 60, Defendant Sovereign Bank ("Sovereign") hereby moves for reconsideration of the Court's January 13, 2011 Order and Opinion denying Sovereign's Motion to Dismiss Based on HOLA Preemption. While the Court acknowledged that Sovereign was entitled to purchase mortgage loans pursuant to federal law, the Court appears to have believed mistakenly that Sovereign had "not identified any law preempting state claims against them when they act in the capacity of a loan purchaser as opposed to a loan originator or loan servicer." Doc. 175 at 16-17. The Court's statement strongly suggests that it overlooked key language contained in the Home Owners' Loan Act ("HOLA") and in the relevant Office of Thrift Supervision ("OTS") regulations. Neither Sovereign nor its counsel seek reconsideration lightly. However, the Court's January 13, 2011 Order and Opinion on the HOLA preemption issue suggests that it may have overlooked relevant law cited in Sovereign's Opening and Reply Suggestions.

Specifically, Sovereign relied upon HOLA § 5(a), 12 U.S.C § 1464(a), and the OTS regulations set forth at 12 C.F.R. § 545.2 and 12 C.F.R. § 560.2(b), and particularly

§ 560.2(b)(10).[1] These relevant statutory and regulatory provisions were cited by Sovereign in its Suggestions in Support and Reply Suggestions. Sovereign Reply, Doc. 130 at 1-4, 5-9; Sovereign Opening Suggestions at 3, 4, 6. As Sovereign previously explained, these relevant statutory and regulatory provisions preempt the entire field of "*operations*" for savings banks or associations, including the purchase and servicing of mortgage loans. Doc. 130 at 1, 3-7.[2] The U.S. Supreme Court has held that HOLA § 5(a) "gave the [OTS] plenary authority to issue regulations governing federal savings and loans" and that the "broad language of 5(a) expresses no limits on the [OTS's] authority" to prescribe relevant regulations. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 160-61 (1982). Pursuant to this plenary authority, the OTS issued regulations that occupied the entire operations field:

> [These regulations] are promulgated pursuant to the plenary and exclusive authority of the [OTS] to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the [HOLA]. *This exercise of the [OTS's] authority is preemptive of any state law purporting to address the subject of the **operations** of a Federal savings association.*

12 C.F.R. § 545.2 (emphasis added). In addition to section 560.2(a) and the other provisions of section 560.2(b), section 560.2(b)(10) of the OTS regulations expressly preempts state laws concerning the "[p]rocessing, origination, ***servicing, sale or purchase of, or investment or participation in, mortgages***." 12 C.F.R. § 560.2(b)(10)(emphasis added). Sovereign has been sued in this case as an alleged loan purchaser and servicer. Although Sovereign discussed and relied upon sections 545.2 and 560.2(b)(10) extensively, the Court limited its discussion to section 560.2(a), without addressing the broader preemption expressed in section 545.2 and

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[1] For the Court's convenience, Sovereign is attaching copies of the OTS regulations, 12 C.F.R. § 545.2 and 12 C.F.R. § 560.2(b) as Exhibits 1 and 2, respectively.

[2] For the Court's convenience, Sovereign is attaching a copy of its Reply Suggestions, Doc. 130, as Exhibit 3.

560.2(b)(10). Put simply, "operations" includes the servicing, purchase of, and investment in mortgages – the activities that Plaintiffs seek to regulate here.

The Court also appears to have overlooked and mistakenly did not apply the OTS's analytical framework, as required by the Eighth Circuit, despite Sovereign's calling this controlling framework to the Court's attention. *See* Doc. 130 at 5 and Doc. 85 at 1. The OTS has specified the relevant analysis in evaluating whether a state law is preempted under its regulations:

> ***When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted***. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.
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> OTS Final Rule, 61 Fed.Reg. 50951, 50966-67 (Sept. 30, 1996)(emphasis added).

In *Casey v. FDIC*, 583 F.3d 586 (8^{th} Cir. 2009), the Court of Appeals for the Eighth Circuit held that this specific analysis outlined in the OTS Final Rule should be followed by district courts and concluded that "a state law that either on its face or as applied imposes requirements regarding the examples listed in §560.2(b) is preempted." *Id.* at 595. *Accord Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1005-08 (9^{th} Cir. 2008). The relevant inquiry under *Casey* is whether the state law, on its face or as applied, imposes requirements such that it is the "type of law enumerated in § 560.2(b)." Once it is determined that the state law claim is one within the types set forth in section 560.2(b), the claim is preempted and the inquiry is over. *Casey*, 583 F.3d at 596; *Silvas*, 514 F.3d at 106. *See also State Farm Bank v. Reardon*, 539 F.3d 336, 347-48 (6^{th} Cir. 2008) (holding Ohio statute preempted by OTS regulations). Because

Plaintiffs' claims against Sovereign seek to impose liability based on Sovereign's alleged servicing, purchase of, or investment or participation in" mortgage loans, their claims fall within the examples listed in section 560.2(b)(10), and thus are preempted under *Casey* and the OTS Final Rule.

In addition to relying on the express language of section 560.2(b)(10), Sovereign pointed out that the preemptive effect of this OTS regulation had been consistently upheld by courts where the claims related to the servicing or purchasing of loans made by entities that are neither banks nor savings associations. Doc. 130 at 9, citing *Quintero Family Trust v. One West Bank, F.S.B.*, 2010 WL 2618729, *6-7 (S.D. Cal. 2010)(dismissing state law claims against savings association as preempted under §560.2(b)(10) even though mortgage loan was made by Clarion Mortgage, a non-bank, non-savings association); *Odinma v. Aurora Loan Services*, 2010 WL 1199886 , *7-8 (N.D. Cal. 2010) (dismissing state law claims against savings association as preempted under §560.2(b)(10) even though mortgage loan was made by MortgageIT, a non-bank, non-savings association); *McKenzie v. Ocwen Federal Bank, FSB*, Case No. CAL03-18977 (Cir. Ct. Prince George's Cty, Md. 2004)(attached as Ex. 2 to Sovereign's Opening Suggestions) (dismissing claims against savings association as preempted under §560.2(b)(10) even though mortgage loan was made by George Crockett, a non-bank, non-savings association).[3] This Court's initial holding, based on Plaintiffs' erroneous argument, that HOLA preemption is inapplicable because Sovereign did not make the loans cannot be reconciled with the language of section 560.2(b)(10) and is inconsistent with the Eighth Circuit's directive in *Casey* to apply the OTS's analytical framework. The inclusion of the broader language in section 560.2(b)(10) makes clear that field preemption extends beyond loans made directly by savings banks to mortgage loans that are purchased, invested or participated in, or serviced.

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[3] Tellingly, Plaintiffs did not dispute in their proposed sur-reply that *Quintero Family Trust* and *Odinma* found the claims against the savings banks preempted under section 560.2(b)(10) irrespective of whether the lender was a bank or savings association.

In fairness and in light of the various authorities cited in Sovereign's prior briefing, including section 545.2, section 560.2(b)(10) and *Casey*, Sovereign respectfully requests that the Court reconsider its ruling on the HOLA preemption issue and, on reconsideration, dismiss Plaintiffs' claims because they are expressly preempted.[4]

WHEREFORE, Sovereign respectfully requests that the Court reconsider its January 13, 2011 Order and Opinion with respect to the HOLA preemption issue because, when this additional express language is considered and the Eighth Circuit's controlling decision in *Casey* is considered and applied, Plaintiffs' state law claims against Sovereign should be dismissed.

Respectfully submitted,
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[4] The Court also asserted that "Curiously, Defendants have made no effort to distinguish the NBA from HOLA, nor have they suggested any reason why the Court should reach a different conclusion now." Doc. 175 at 16. Sovereign previously explained that HOLA preemption involves field preemption, whereas the NBA involves conflict preemption. Doc. 130 at 11-12. Sovereign also explained that "none of the cited [NBA] remand cases addressed 12 C.F.R. § 545.2 or § 560.2 or any similar field preemptive regulation, let alone one that expressly preempts state laws affecting the relevant loan purchasing, investment and servicing operations. Nor did any of their cited cases address the Eighth Circuit's decision in *Casey* . . . ." Doc. 130 at 12.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document was filed electronically with the Clerk of the United States District Court for the Western District of Missouri, Western Division, this 26th day of January, 2011, with notice of case activity to be generated and sent electronically to all designated persons.

/s/ Randolph G. Willis
An Attorney for Sovereign Bank